No. 20146

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BRASWELL MOTOR FREIGHT LINES, INC.,

Appellant,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *et al.*,

Appellees.

APPELLEES' BRIEF.

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APPELLEES' BRIEF.

Statement of the Case.

The appellant Braswell Motor Freight Lines, Inc. (the Employer) is an employer in an industry affecting commerce within the meaning of the Labor Management Relations Act (the LMRA) [R. 320, ¶2], and the appellees Western Conference of Teamsters, and Local Unions 208, 224, 357 and 495, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Unions) are each labor organizations within the meaning of the LMRA [R. 320, ¶3].[1]

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[1]Although there were other defendants sued, including the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, the action was dismissed at the time of trial as to all defendants other than the appellees [R. 319-20, ¶32].

As a member of the California Trucking Association [R. 75, ¶7], the Employer was party to a collective bargaining agreement entitled "Western States Area Master Freight Agreement" [*ibid.*] (the Master Agreement), as well as party to certain agreements supplemental thereto [R. 75-76, ¶8]. These agreements encompass employers and unions in eleven western states of the United States [R. 84].

Commencing on June 11, 1962, some of the Employer's workers represented by the Unions engaged in a strike over what they believed were unfair labor practices being engaged in by the Employer in another of its operations [R. 78, ¶20], and concerning which, charges had been filed against the Employer with the National Labor Relations Board (the Board) [R. 77, ¶18]. The strike lasted from June 11, 1962 through April 1, 1963, and during this period the Employer replaced the striking workers with other employees [R. 79-80, ¶¶26-29]. On behalf of the replaced workers, grievances were filed by the Unions, seeking their reinstatement and the restoration to them of seniority rights [R. 80-81, ¶33]. These grievances alleged that the Employer's refusal to reinstate the striking employees with seniority rights constituted a violation of article 6, section 1, and article 10, section B-1 of the Master Agreement [*ibid.*].

Pursuant to article 8, section 1 of the Master Agreement, there are created a number of "Joint Area Committees" for different geographical areas covered by the Master Agreement [R. 88]. These Committees are composed of equal numbers of employer and union representatives who hear and resolve disputes arising between parties to the Master Agreement [*ibid.*] in ac-

cordance with the procedures set forth in article 9 [R. 89].[2]

A similarly constituted body, called the "Joint Western Committee," is created by section 2 of article 8 [R. 88]. The function of this Committee is to act as an appellate board for matters that cannot be decided by the various Joint Area Committees [R. 89, art. 9, §1(a)]. It also has the power, if the members of the Joint Western Committee unanimously so decide, to review cases that have been resolved by a Joint Area Committee. And it is the Joint Western Committee which is charged with the responsibility, at the request of either the Union or Employer Area Secretary, of deciding all matters pertaining to the interpretation of the parties' collective bargaining agreements [*id.*, §1(d)].

The grievances initiated by the Unions in this case were filed with the Southern California Area Joint Committee [R. 80-81, ¶33]. At a hearing held by this Committee, the Employer entered a special appearance for the purpose of contesting that Committee's jurisdiction to hear the dispute [R. 81, ¶34(a)]. The Employer's procedural challenge to the Committee's jurisdiction was ruled upon adversely to the Employer [R. 161, lines 23-26]; however, the Joint Area Committee deadlocked on the merits of the dispute [R. 189, line 21, to R. 193, line 4]. The deadlocked grievances were then referred by the Union Secretary of the Joint Area Committee to the Joint Western Committee [R. 82, ¶34(c)] pursuant to article 9, section 1(d) of the Master Agreement [R. 89].

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[2]These Committees are, pursuant to the holding of *General Drivers Union v. Riss & Co.*, 372 U.S. 517 (1963), capable of rendering an enforceable arbitration award.

The Joint Western Committee ruled that the hearing on the merits be postponed pending the decision of the National Labor Relations Board in the case then pending against the Employer [R. 196, line 25, to 197, line 7; R. 198, lines 18-27].

As noted in the Employer's brief, the Board has now rendered its decision (see Op. Br. of Appellant at 4, n.4), in which it found the Employer to have committed unfair labor practices within the meaning of sections 8(a)(1) and 8(a)(5) of the LMRA [29 U.S.C. §§158(a)(1), 158(a)(5)].

Braswell Motor Freight Lines, Inc., 154 N.L.R.B. No. 20, 59 L.R.R.M. 1711 (July 30, 1965).

The Employer sought in the district court, to have the arbitration before the Joint Committees enjoined from proceeding [R. 10, ¶¶3, 4]. That court ruled that the Unions' grievances were arbitrable, and the court refused the Employer any relief [R. 321-22 ¶¶9, 10]. This appeal then followed.

ARGUMENT.

Three major premises underlie each of the arguments advanced by the Employer. One is that the grievance procedure involved in this case does not result in a final adjustment, and therefore, that the ordinary rules relating to arbitrability under section 301(a) of the LMRA are inapplicable. Second, that an arbitrator may not resolve a contract dispute if the conduct of one of the parties arguably constitutes an unfair labor practice. And third, that certain language of the parties' contract precludes the Unions' grievances from being processed.

These arguments shall be examined in order and shall be shown to be baseless.

A. WHETHER THE PARTIES' CONTRACT RESULTS IN A FINAL AND BINDING ARBITRATION AWARD IS NOT RELEVANT TO A DETERMINATION IN THIS CASE, BUT EVEN IF IT IS RELEVANT, THE PARTIES' PROCEDURE DOES IN FACT RESULT IN A FINAL AND BINDING DECISION.

The Employer argues that the grievance procedure in the parties' collective bargaining agreement does not provide for a final and binding decision, and that as a result, "the rule of liberal interpretation of true arbitration provisions in favor of coverage" of particular disputes is not applicable (Op. Br. of Appellant at 40). Both the premise and the conclusion are faulty.

1. The Grievance Procedure Created by the Parties' Collective Bargaining Agreement Provides for Final and Binding Arbitration.

a. The Contract Itself Is Binding, Thus, Any Interpretation of the Contract Is Binding Because Such Interpretation Becomes a Part of the Contract.

The dispute involved in the present case is one concerning "the interpretation of . . . provisions of this agreement" within the meaning of article 9, section 1(d) of the Master Agreement (see Op. Br. of Appellant at 39), and it is one which was referred to the Joint Western Committee by the Union Secretary of the Joint Area Committee [R. 82, ¶34(c)]. The Joint Western Committee (the appellate body before whom the dispute is pending) is given authority by the Master Agreement to render a "final decision" [R. 89, art. 9, §1(d)].

The Employer evidently (but we presume not too seriously) considers the fact that such a decision is not specifically denominated *in the grievance section* to be "binding" as well as final, to be of some importance. The absence of the word "binding" in the grievance section, however, is worth no weight since the parties have agreed in other parts of the contract "to be bound by the terms and conditions of this Agreement" [R. 84, preamble], and they have stated that "this Agreement shall be binding upon the parties hereto" [R. 85, art. 1, §3].

The interpretation of a collective bargaining agreement by the body authorized to make such an interpretation becomes a part of the contract; and this being so, it is binding on the parties.

Lewin-Mathes Co., 37 Lab. Arb. 119, 121 (Moore 1961) ("a prior arbitration interpretation of a contract provision becomes part of the agreement");

Stewart-Warner Corp., 33 Lab. Arb. 816, 818-19 (Uible 1960) ("the interpretation of contract language embodied in an award becomes a part of that contract language");

See *H. K. Porter Co. v. United Saw Workers,* 333 F.2d 596, 601 (3d Cir. 1964) (arbitrator authorized to base award on parties' prior interpretation of contract);

Oddie v. Ross Gear & Tool Co., 305 F.2d 143, 151 (6th Cir. 1962) (court may base decision on parties' past interpretation of contract);

Cf. Panza v. Armco Steel Corp., 316 F.2d 69, 70 (3d Cir.), *cert. denied,* 375 U.S. 897 (1963) (relitigation of matter that has been arbitrated is proscribed by doctrine of res judicata).

Not only the contract, therefore, but any interpretation of the contract under the parties' grievance procedure is binding on the parties. Thus, if the Joint Western Committee renders a decision, it shall be binding on the Employer and the Unions.

b. The Present Dispute May Be Submitted to Umpire Handling and May, Therefore, Be One Concerning Which a Final Decision May Arise.

In addition to making decisions of the Joint Western Committee final, the contract states that,

> "all cases deadlocked in the Joint Western Committee with the exception of those provided in sub-

section (f) of this Article *may*[3] be submitted to umpire handling if a majority of the Joint Western Committee determines to submit such matter to an umpire for decision" [R. 89, art. 9, §1(e) (emphasis added)].

In order to arrive at the conclusion that a decision of the Joint Western Committee is not final, the Employer must conjecture that a deadlock shall result and that the Joint Western Committee shall refuse to submit the matter to umpire handling. If all this conjecture comes to pass, there may turn out to be a non-final decision at the Joint Western Committee level.

If, on the other hand, a deadlock results and the matter is submitted to umpire handling, the umpire is empowered to make a "decision" [R. 89, art. 9, §1(e)], which, if the parties intended it to be so, shall be final and binding (see argument following).

c. An Award May Be "Final and Binding" Although the Contract Does Not Use Those Terms.

Following all the conjecture engaged in by the Employer, the Employer's contention is that if the matter were submitted to umpire handling the contract does not state that the umpire's decision shall be "final and binding," and without such language it is argued, the award of the umpire is neither final nor binding (see Op. Br. of Appellant at 39).

A collective bargaining agreement need not use words of art such as "final" and "binding" in order that an

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[3]See *Deaton Truck Line, Inc. v. Local 612, Int'l Bhd. of Teamsters*, 314 F.2d 418, 422 [2] (5th Cir. 1963) (holding that use of the word "may" in the grievance section of a collective bargaining agreement does not make the procedure nonmandatory under section 301(a)); *accord, Independent Soap Workers v. Procter & Gamble Mfg. Co.*, 314 F.2d 38, 43 (9th Cir. 1963).

award rendered pursuant to such an agreement may be enforced. In *General Drivers Union v. Riss & Co.,* 372 U.S. 517 (1963), the Supreme Court indicated that the words "final and binding" need not necessarily appear in the contract. There is no simple formula, said the Court, for determining whether an award may be confirmed under section 301(a), because the issue in each case is a factual one. In the case before it, a case in which the confirmation of an award was in issue, the Court said:

> "[I]f the award at bar is the parties' chosen instrument for the definitive settlement of grievances under the Agreement, it is enforceable under §301. . . . Of course, if it should be decided after trial that the grievance award involved here is not final and binding under the collective bargaining agreement, no action under §301 to enforce it will lie" 372 U.S. at 519-20.

The case before this Court is one in which an award rendered by the Joint Western Committee is specifically stated to be final and binding, and we do not understand the Employer to seriously question the fact that it shall be bound by a decision of that body.[4]

The only serious attack is directed at the umpire's decision because the words "final and binding" are not present. Their absence, however, is far from fatal. In other cases interpreting section 301(a), finality has been found where the collective bargaining agreement did not *state* that an award was final but where the par-

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[4]Almost identical contract language as is present here has been involved in numerous other cases, such as *Truck Drivers v. Georgia Highway Express, Inc.,* 328 F.2d 93 (5th Cir. 1964), where confirmation was ordered.

ties construed it as such, *Local 24, Int'l Bhd. of Elec. Workers v. Wm. C. Bloom & Co.*, 242 F. Supp. 421, 425 (D. Md. 1965); where a settlement agreement (which did not state that the agreement was final and binding) was entered into by the parties, and one party sought to have the settlement agreement confirmed under section 301(a), *Amalgamated Meat Cutters v. M. Feder & Co.*, 234 F. Supp. 564, 567-68 (E.D. Pa. 1964); *id.*, 224 F. Supp. 739 (E.D. Pa. 1963); and where, as in the present case, the word "final" did not appear in the contract, but the contract contained no further steps for internal appellate review of a decision, *Transport Workers Union v. Philadelphia Transp. Co.*, 228 F. Supp. 423, 425 (E.D. Pa. 1964).

Thus, the question of finality need not be answered solely by the face of the parties' contract. The answer must await a trial at the time of an application for confirmation or vacation of an award.

d. The Right to Strike to Enforce an Award May Exist Concurrently With the Right to Enforce an Award Judicially; Thus, the Presence of the Right to Strike Does Not Mean There Is No Right to Judicially Enforce an Award.

The Employer evidently argues (see Op. Br. of Appellant at 39-40) that no award under the Master Agreement can be judicially enforced because of the provision of article 9, section 1(i) [R. 89]. This section deals with some of the remedies available—including the right to strike an employer—for failure to comply with the grievance procedure or with a decision of an arbitration committee. From the fact that under this contract the unions are given the right to strike noncomplying employers [see R. 89, art. 9,

§1(h)], it does not follow that an award is not also judicially enforceable. Indeed, the case of *Allied Oil Workers Union v. Ethyl Corp.*, 341 F.2d 47 (5th Cir. 1965), cited and heavily relied upon by the Employer, stands for the proposition that under section 301(a) of the LMRA, courts may not be ousted of their duty to aid the parties in the settlement of contract disputes, and the case directly holds that a srike is *not* the only remedy available for contract enforcement.

See also *International Bhd. of Tel. Workers v. New Eng. Tel. & Tel. Co.*, 240 F. Supp. 426, 430-31 (D. Mass. 1965).

Article 9, section 1(h) of the Agreement comes into play only if a union takes economic action to enforce a decision of a committee. In such event, this section absolves the union from being bound by any tribunal's determination regarding "the legality or lawfulness of the strike unless the Union stipulates to be bound by such interpretation" [R. 89, art. 9, §1(i)]. This Section cannot be used, therefore, for the proposition that an arbitration award is not binding.

2. The District Court Was Correct in Concluding That the Enforceability of an Award Arising Out of the Grievance Procedure Is Not at Issue in a Proceeding Such as the Present One.

In the district court, the Employer sought to enjoin the arbitration from proceeding on the ground, among others, that no final and binding award would result. The court pointed out that the parties had agreed in article 9, section 1 of the Master Agreement that there would be "no srike, lockout, tie-up or legal pro-

ceeding without first using all possible means of settlement, as provided for in this Agreement, of any controversy which might arise." From this the Court concluded that the Employer's claim of possible nonenforceability of an award as a basis for enjoining an arbitration from proceeding was premature:

> "The policy of the Labor Act can be effectuated only if the means chosen by the parties for settlement of their differences is given full play. *Truck Drivers vs. Riss & Co.,* [372 U.S. 517 (1963)]. Whether the award ultimately made pursuant to the grievance procedure in the case at bar will be binding and enforceable will be resolved at a subsequent proceeding, should one of the parties conclude that such action is required after the award has been made" [Memorandum Op., R. 280].

In the *Riss* case, cited by the district court, the question of whether an award was intended by the parties as their "chosen instrument for the definitive settlement of grievances under the Agreement" was specifically left for the compliance stage of the proceedings, see 372 U.S. at 519.

In an analogous situation (an appeal from an order compelling arbitration), a California court recently denied the right to appeal at that stage of the proceedings, saying:

> "Requiring appellant to submit to arbitration at this time will not substantially affect its rights. In the arbitration proceeding, appellant may prevail. . . . On the other hand, if appellant loses in arbitration it then has a statutory right of appeal. . . ." *Laufman v. Hall-Mack Co.,* 215 Cal. App. 2d 87, 89-90 (1963).

In addition to the lack of injury to the Employer by requiring it to arbitrate its dispute and leave for the compliance stage its argument concerning the non-enforceability of an award, there is an affirmative duty upon the Employer to arbitrate at this time. This duty arises from the terms of the Master Agreement which binds the parties to submit disputes through the proper channels. And this duty is not any the less enforceable even assuming the end result to be a nonbinding award.[5]

The employer's contention, derived from section 203-(d) of the LMRA [29 U.S.C. §173(d)], is that it would violate public policy to require the submission of a dispute to a grievance procedure which does not culminate in a final award. Section 203(d) does not, however, state that "final determinations" are the exclusive approved methods for the settlement of disputes. That section only makes such determinations "the *desirable* method." There would be a far greater injury to public policy by permitting a party to abrogate his contractual commitment through noncompliance with the agreed-upon method of adjustment, than by requiring a party to submit to a procedure which is not *the most* desirable procedure.

A grievance procedure that does not culminate in an enforceable award does not *ipso facto* deprive the Unions of their right to utilize this procedure. The Employer has agreed to submit disputes to the designated committees and it is bound by its agreement.

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[5]Compare the provision of section 3, First (m) of the Railway Labor Act [45 U.S.C. §3, First (m)], which specifically states that money awards shall *not* be "final and binding." Nonetheless, the Supreme Court has held that resort to this non-final grievance procedure is mandatory, *Brotherhood of Locomotive Eng'rs v. Louisville & N. R.R.*, 373 U.S. 33, 38 (1963).

The national policy, as expressed in the *Riss* case, favors such a submission:

> "[T]he policy of the Labor Act 'can be effectuated only *if the means chosen by the parties* for settlement of their differences *under a collective bargaining agreement* is given full play.'" *General Drivers Union v. Riss & Co.*, 372 U.S. 517, 519 (1963) (emphasis added).

The case cited by the Employer, *Allied Oil Workers v. Ethyl Corp.*, 341 F.2d 47 (5th Cir. 1965), does not stand for the proposition that resort need not be had to a non-final grievance procedure (Op. Br. of Appellant at 44). To the contrary, the district court in that case ruled that the parties were absolved from any further steps only "*after* the [non-final] grievance procedures are exhausted," 218 F. Supp. 438, 441 (E.D. La. 1963) (emphasis added), and the circuit court's opinion shows that the parties in fact exhausted all preliminary steps in the non-compulsory arbitration clause of their contract, 341 F.2d at 48. There is no language in that case to support the proposition that the steps leading up to a deadlock, which themselves are mandatory, need not be taken simply because they may not culminate in a final decision.

In sum, the question of enforceability of a decision of one of the committees created by the contract is premature since that question need be answered only at the time one of the parties seeks to confirm or vacate an award. But even though it is unnecessary to a decision in this case, we have shown that the parties' grievance procedure may in fact produce a final and binding award.

B. THE UNIONS' GRIEVANCES ARE ARBITRABLE.

1. The Unions' Grievances Do Not Necessarily Involve a Determination of Unfair Labor Practices.

The Employer contends that the Unions' grievances are nonarbitrable because they necessarily involve a resolution of the question of whether the Employer engaged in unfair labor practices, and such resolution is within the exclusive province of the National Labor Relations Board.[6]

The grievances filed by the Unions allege that certain provisions of the Master Agreement were violated. Under these circumstances, the function of a court "is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract."

United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 (1960).

The Supreme Court in the *American Mfg.* case laid to rest the "Cutler Hammer" rule under which a court, in the guise of determining arbitrability, would examine the grievance and deny an order to arbitrate if the court felt the grievance was not meritorious.

The grievances in this case are, on their face, governed by the Master Agreement. For example, article 6, section 1 of the Master Agreement [R. 87], which is alleged by the Unions to have been violated, states that seniority rights are lost only by "discharge, vol-

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[6]As pointed out in note 4 of the Opening Brief of the Appellant, the Board has issued a decision in the relevant unfair labor practice case, *Braswell Freight Lines, Inc.*, 154 N.L.R.B. No. 20, 59 L.R.R.M. 1711 (1965), and has found that the Employer committed unfair labor practices. The Employer's argument may, therefore, be moot.

untary quit, more than a two year (2) layoff," or certain conduct during a leave of absence. In resolving this grievance, the question could, for example, be whether the employees' action constituted a voluntary quit. But whether in resolving the Unions' grievances the arbitral committee finds it necessary to rule on any particular issue or in any particular manner is purely conjectural, and under the *American Mfg.*, as opposed to the "Cutler-Hammer" doctrine, the basis of the decision is irrelevant to the present proceeding.

In the absence of an "express provision excluding [the Unions'] grievance from arbitration," the matter is arbitrable.

United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 584-85 (1960);

Accord, Desert Coca Cola Bottling Co. v. General Sales Drivers, Local 14, 335 F.2d 198 (9th Cir. 1964) (holding that the issue of overtime pay was not "specifically excluded" from the grievance clause of a contract by a provision stating that there shall be no arbitration "concerning wages").

By raising the specter of "unfair labor practices," the Employer seeks to convert the Unions' grievances from what the Unions say they are to something the Employer says they are. But the Supreme Court has disposed of this device as well. In *Local 721, United Packinghouse Workers v. Needham Packing Co.*, 376 U.S. 247 (1964), a union sought to arbitrate the discharge of employees who had been fired for participating in a strike against their employer, and in a counterclaim, the employer sought damages of the union for an illegal strike. The court said:

> "That Needham asserts by way of defense to the union's action to compel arbitration [of the discharges] the same alleged breach of the no-strike clause which is the subject of the counterclaim *does not convert the union's grievance into Needham's different one.*" 376 U.S. at 253 (emphasis added).

See also *Los Angeles Paper Bag Co. v. Printing Specialties Union,* 345 F.2d 757, 759 (9th Cir. 1965).

The Unions' grievances are not what the Employer would have them be, but rather, what the Unions say they are. As such they shall be shown to be not expressly excluded from the grievance procedure and they are, therefore, arbitrable.

2. Even Assuming a Determination Must Be Made by the Arbitration Committees of Matters Normally Decided by the National Labor Relations Board, Concurrent Jurisdiction Exists Between The Board and Arbitrators.

Under the Employer's transposition of the Unions' grievances, the arbitration committee may or may not have to decide questions normally decided by the National Labor Relations Board. Assuming such decision is necessary, the Supreme Court has stated that this is not a bar to arbitration for there is concurrent jurisdiction between the courts, arbitrators and the Board where a breach of contract is involved.

Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964);

Smith v. Evening News Ass'n., 371 U.S. 195 (1962).

The citation by the Employer of cases dealing with preemption is inapposite since those cases dealt with

the commission of torts, where the exclusive remedy admittedly is with the Board, while the present case seeks to remedy a breach of contract. The difference, under the rulings of *Smith* and *Carey* is significant. And this Court has indicated that where the issue is one of contract interpretation, the Board is less competent to decide such matters than the parties' chosen tribunal.

See *NLRB v. C & C Plywood Corp.*, ... F.2d ...., 60 L.R.R.M. 2137, 2140 (9th Cir. 1965);

Square D Co. v. NLRB, 332 F.2d 360, 366 (9th Cir. 1964).

The fact that *conduct* must be assessed by the arbitration committee which may constitute a violation of the LMRA does not deprive the Unions of their right to process a grievance alleging a contract breach. In *Smith v. Evening News Ass'n,* 371 U.S. 195 (1962), the Supreme Court held that a dispute was arbitrable in which the conduct was not only "arguably" but concededly an unfair labor practice.

The Employer's entire argument on the issue of arbitrability, in sum, appears to be grounded on conjecture, for the Employer presupposes a deadlock over the dispute at the Joint Western Committee; presupposes that the Joint Western Committee shall not submit the dispute to umpire handling; and the Employer also has the temerity to forecast that the basis of the ruling by Joint Western Committee (if the Committee is able to come to an agreement) or the umpire (if the dispute is submitted to him), would involve the resolution of the same matters the Board had before it. Even assuming the outcome of this speculation is as

the Employer states it shall be, there still exists no basis for enjoining the arbitration from proceeding since the Supreme Court has clearly held there may be dual forums for this type dispute.

C. THE UNIONS' GRIEVANCES ARE NOT EXPRESSLY EXCLUDED FROM THE GRIEVANCE PROCEDURE.

Under the mandate of *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582-83 (1960),[7] it is incumbent on the party opposing arbitration to point to express language in the collective bargaining agreement which precludes a hearing of the particular dispute.[8] Two sections of the contract have been adverted to by the Employer. One is section 1(h) of article 9 and the other is section 1(i). Neither is sufficient to meet the test of exclusion.

1. Section 1(i) Does Not Exclude the Unions' Grievances From Arbitration.

The Employer's brief spends four and one-half pages (Op. Br. of Appellant at 18-22) attempting to demonstrate that a phrase in section 1(i) of article 9 excludes the Unions' grievances from consideration by the

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[7] *Accord, Association of Industrial Scientists v. Shell Dev. Co.*, 348 F.2d 385, 387-88 (9th Cir. 1965); *Desert Coca Cola Bottling Co. v. General Sales Drivers*, 335 F.2d 198, 200-01 (9th Cir. 1965).

[8] Inasmuch as the rule *in this circuit* is that the parties' bargaining history with respect to the arbitrability of a dispute may be introduced at the district court level, see *Pacific Northwest Bell Tel. Co. v. Communication Workers*, 310 F.2d 244, 247 (9th Cir. 1962); *but see International Union of Elec. Workers v. Westinghouse Elec. Corp.*, 228 F. Supp. 922, 926 (S.D.N.Y. 1964), the burden of demonstrating that a grievance is excluded from arbitration should be commensurately greater in this circuit because the party upon whom the burden rests has more sources of ammunition than in other circuits.

arbitration committees.[9] That so many pages need be devoted to this task is evidence of itself that the exclusionary test requiring an "express provision," *United Steelworkers v. Warrior & Gulf Nav. Co.*, 362 U.S. at 584, has not been met.

The sentence of the contract referred to merely permits an Employer to secure an injunction against a strike which violates the agreement, *cf. Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195, 226 (1962) (dissenting op.) ("States remain free to apply their injunctive remedies against concerted activities in breach of contract"), and has no deeper meaning than that. But even if it had the meaning ascribed to it by the Employer, it would merely permit legal action *by an Employer*, but not forbid the filing of a grievance by a Union.

2. Section 1(h) Does Not Exclude the Unions' Grievances From Arbitration.

Nine and one-half pages of the Employer's brief (Op. Br. of Appellant at 26-35) are devoted to an argument that section 1(h) of article 9 excludes the Unions' grievances from arbitration.[10] The Employer doth protest too much, methinks, and again, the exclusionary test, which requires *clear* language has not been met in this case.

After pointing out that the Unions failed to grieve in advance of their strike, to determine whether or not the strike would be lawful, the Employer concludes

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[9]The phrase reads: "Nothing contained herein shall prevent legal proceedings *by the Employer* where the strike is in violation of this agreement" (emphasis added).

[10]In relevant part, this section reads as follows: "[R]efusal of either party to submit to or appear at the grievance procedure at any stage, or failure to comply with any decision, withdraws the benefits of Article 9."

that the Unions have thus waived their right to arbitrate any issues which are connected with, or arise out of the strike. This conclusion follows, says the Employer, from the fact that the Unions failed "to submit to . . . the grievance procedure" [R. 89, art. 9, §1(h)]. The district court construed the word "submit," otherwise:

> "The phrase 'to submit,' the court concludes, is more reasonably interpreted to mean conduct that must be followed once grievance machinery has been set in motion" [Memorandum Op. R. 277].

And of course this is so, for a telling argument to counter the Employer's interpretation, is that if a party loses the benefits of the grievance procedure as well as the benefits of the no-strike pledge by failing "to submit to . . . the grievance procedure" an arbitrable dispute, then under the Master Agreement no employer may discharge an employee [see R. 91, art. 11, §1], or engage in any other act which is subject to a grievance, without submitting such decision in advance to one of the arbitration committees for approval.

This is patently unreasonable, impractical, and is simply not the manner in which labor relations function. Parties take whatever action they feel is justified and rely upon the other party filing a grievance following that action to ascertain whether or not it was in accord with the parties' contractual obligations. By having taken action which they felt was correct without first submitting their complaint to the grievance procedure, the Unions cannot thereby have waived their right to thenceforth utilize the arbitration provisions of the contract.

Another argument advanced by the Employer is that both the words "submit to" and "appear at" the grievance procedure are found in article 9, section 1(h), and that since they undoubtedly have different meanings, "submit" must mean initiating a proceeding while "appear" connotes being present. The Employer's argument then is as follows:

> "The District Court says 'submit' refers only to conduct '. . . that must be followed once Grievance Machinery has been set in motion . . .'. So interpreted the question is immediately posed as to how a person can 'submit' to a grievance procedure 'already set in motion' other than to 'appear' at the proceedings. . . . In the context in which it appears the term 'submit' must be read as having reference to the act of starting the [grievance] proceedings . . . or it serves no useful purpose" (Op. Br. of Appellant at 30).

To answer the question posed by the Employer as to "how a person can 'submit' to a grievance procedure . . . other than to 'appear,' " one need look no farther than the record in the present case. For here, the Employer "appeared" before the Joint Area Committee, albeit it was a "special appearance" [R. 154, lines 17-21; R. 164, lines 9-14], and at the same time the Employer contended that it was not thus "submitting" to the Committee's jurisdiction.

The language of article 9, section 1(h) which withdraws the benefits of article 9 of the contract from a party who refuses to "submit" to the grievance pro-

cedure, has reference *to a party in default* where a grievance is initiated by his adversary. As a penalty for such default, the party loses the benefits of the no-strike, no-lockout clause of article 9. Section 1(h) does not, however, thenceforth forbid the defaulting party's use of the grievance procedure.

See *Local 721, United Packinghouse Workers v. Needham Packing Co.,* 376 U.S. 247 (1964).

Moreover, although the Employer attempts to obfuscate it, there is a plain difference between stating that a "*controversy* shall be 'submitted' to the 'grievance procedure' " (see examples cited by Employer (Op. Br. of Appellant at 29-30)), and stating that a "*party* [shall] submit to . . . the grievance procedure." The difference is that in the instances cited by the Employer in its opening brief, the contract requires the subject matter of the dispute to be submitted to the grievance procedure, while the use of the word "submit" in article 9, section 1(h) is a jurisdictional term referring to a party.

Finally, the argument made by the Employer based on the word "submit," is one which should properly be made before the arbitrators for it concerns, at most, a *procedural* objection to the Unions' grievances, and under *Livingston v. Wiley & Sons,* 376 U.S. 543, 555-59 (1964), procedural questions such as these are not for the courts.

D. THE REMAINING ARGUMENTS OF THE EMPLOYER ARE WITHOUT MERIT.

With these major arguments answered, it takes but a word to treat with the Employer's remaining observations.

1. The argument that a reading of the Master Agreement and all the supplements leads to the conclusion that the present grievance is not arbitrable because it involves an interpretation of the LMRA (Op. Br. of Appellant at 23-24), is another attempt by the Employer to transpose the grievances. Two sections of the collective bargaining agreement are claimed by the Unions to have been violated, articles 6 and 10. These grievances arise under the parties' contract and are, therefore, arbitrable.

United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 (1960).

2. We disagree with the Employer's statement that resolution of the Union's grievances "necessarily involves a determination of whether the Appellant was in fact engaged in unfair labor practices" (Op. Br. of Appellant at 25). While we agree that the arbitration committee must decide the question of whether the Unions' strike violated the collective bargaining agreement [see Conclusion of Law No. 6(b), R. 320-21]; *Los Angeles Paper Bag Co. v. Printing Specialties Union,* 345 F.2d 757 (9th Cir. 1965), it is presumptuous on the Employer's part to attempt to forecast the manner in which the arbitration committee shall arrive at its decision, or the rationale of that decision. Time enough for upsetting an award at the compliance stage if the committee's reasoning discloses that it has tread upon sacred ground.

3. The Employer seeks to punish the Unions for having engaged in a strike which allegedly violated the contract, by depriving them of the right to seek a determination "as to any issue pertaining to or arising out of that controversy" (Op. Br. of Appellant at 32). This ignores the Unions' position that the strike was not in violation of the parties' contract, see *Drake Bakeries, Inc. v. Local 50, American Bakery Workers,* 370 U.S. 254, 256, 263 (1962), and it ignores the conclusions of the district court, with which the Unions agree, that the issues over which the Unions struck were not issues which were subject to the grievance procedure [R. 321, Conclusion of Law Nos. 6(c), (d) and (e)].[11] Further, under the ruling of *Allied Oil Workers v. Ethyl Corp.,* 341 F.2d 47 (5th Cir. 1965), the Employer cannot deprive the Unions of *some* forum.

4. Complaint is registered by the Employer over the fact that the district court did not stay the arbitration proceeding pending a determination by the Board of certain related matters (Op. Br. of Appellant at 49). In addition to the fact that such relief was not requested, this complaint now appears moot inasmuch as a decision has been rendered by the Board finding that the Employer did engage in unfair labor practices.

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[11]Parenthetically, these conclusions were proposed by the Employer [R. 301, 308-09], and were not originally in the Unions' proposals [R. 283, 287].

Conclusion.

The Employer fears that should the arbitrators render a decision, such decision might infringe upon the jurisdiction of the Board. It is a sufficient answer that if the arbitrators fail to hew to the contract they have been empowered to interpret, their award shall be subject to non-confirmation or vacation.

We urge the Court not to become too deeply involved in the Employer's game of speculating as to the contents of the arbitration award. All that is required at this stage is a glance at the parties' contract; and if there is no express bar to the matters sought to be arbitrated, the ruling of the district court should be affirmed and the arbitration should proceed.

Respectfully submitted,

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Certificate.

I Certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

JULIUS REICH